No. 202.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

GREAT NORTHERN RAILWAY COMPANY AND JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, PETITIONERS,

v.

MERCHANTS ELEVATOR COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PETITIONERS.

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INDEX.

LIST OF CASES CITED.

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STATEMENT OF CASE.

Certiorari was asked in this case to determine whether, consistently with the decision of this court in the case of *Texas & Pacific Railway Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, a court might award damages for an alleged overcharge on an interstate shipment based on a court's construction of the disputed meaning of an interstate tariff, or whether resort must be had in the first instance to the Interstate Commerce Commission to determine the proper construction.

The Supreme Court of Minnesota had affirmed a judgment of the Municipal Court of the city of Minneapolis awarding the respondent $80 damages, with interest and costs, for an alleged overcharge on 16 interstate shipments of grain (Tr. 56), the sole issue being, as stated by the State Supreme Court, "as to the meaning of the language of the (tariff) exception" (Tr. 61). The State Supreme Court (Tr. 62) on the authority of its decision in the case of *Reliance Elevator Co.* v. *C. M. & St. P. Ry. Co.*, 139 Minn. 69, overruled the petitioners' contention that the court had no jurisdiction to construe the disputed meaning of the tariff and affirmed the construction placed upon the tariff by the trial court, which was the construction contended for by the respondent and was contrary to the construction contended for by the petitioners (Tr. 61).

The sole question on this writ being one of jurisdiction, the merits of the respective constructions of the tariff provision in issue are irrelevant. *Mitchell Coal Co.* v. *Pennsylvania Railroad*, 230 U. S. 247, p. 255. The question of the proper construction, therefore, will not be gone into in further detail than is necessary to show that the determination of this question was the basis of the court's judgment in favor of the respondent, and to demonstrate that the specific question involved was one peculiarly within the administrative functions of the Interstate Commerce Commission to determine, primarily because of the necessity of uniformity in the determination of such

questions, and secondarily because of the technical nature of the considerations involved.

As has already been noted, the opinion of the State Supreme Court (Tr. 61) states that the issue of the disputed tariff construction was the sole issue involved. Indeed, that issue was immediately raised by the pleadings, the complaint in the Municipal Court alleging (Tr. 2) that the petitioners had collected the charges in issue "contrary to their duly published tariffs" and the separate answers of petitioners denying this allegation (Tr. 3–4). On trial counsel for the respondent in his opening statement (Tr. 5) stated:

> It is our contention * * * that the $5 rule was suspended. It is the contention of the Great Northern that the charge of $5 was still in effect. And the only question, so far as I know, in this case is simply what the tariff provides.

Based on this statement and on the pleadings, counsel for petitioners immediately asked the trial court (Tr. 6) to dismiss the suit on the ground that counsel's statement, as well as the pleadings, showed that the question involved was a disputed question of construction of an interstate tariff filed with the Interstate Commerce Commission, and that such a question was one within the exclusive jurisdiction of the Interstate Commerce Commission under the decision of this court in the case of *Texas & Pacific Railway Co.* v. *American Tie & Timber Co.*, *supra*, and *Loomis* v. *Lehigh Valley Railroad*, 240 U. S. 43. The court,

however (Tr. 10), received testimony as to the construction of the tariff, subject to the objection. After testimony for the respondent by three alleged experts and at the close of respondent's case (Tr. 10–44), counsel for petitioners renewed the motion to dismiss, which the court thereupon denied (Tr. 44). After testimony by an expert for petitioners (Tr. 44–50), counsel for petitioners again renewed the motion to dismiss, which the court, after hearing arguments and receiving briefs, overruled, and thereupon entered judgment on the merits for the respondent (Tr. 56).

The dispute as to the proper construction of the tariffs arose in connection with Rule 10 of G. N. Ry. I. C. C. No. A–4524 (Plaintiff-respondent's Exhibit C; Tr. 20) which reads as follows:

> Rule 10. Diversion or reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading, or if the original destination is served by a terminal yard, then after arrival at such terminal yard, a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination.

This tariff originally contained an exception reading (Tr. 18):

> "These rules will not apply to—
>
> (*a*) Grain, hay, straw, or grass and field seeds held or stopped for official inspection.

This tariff, set out in full (Tr. 16–26), was published to become effective May 1, 1918.

On April 29, 1918, however, the Interstate Commerce Commission published a suspension order (Plaintiff-respondent's Exhibit D; Tr. 27). This order read, in part (Tr. 27–28):

> It is further ordered, that the operation of the rules and charges governing grain, seed (field), seed (grass), hay or straw—carloads—*held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto,* appearing in said schedules contained in said tariffs, be suspended, and that the use of the said rules and charges, therein stated, be deferred upon interstate traffic until the 29th day of August, 1918, unless otherwise ordered by the Commission, and no change shall be made in such rules, charges, regulations and practices during the said period of suspension unless authorized by special permission of the Commission.

In compliance with this order, Supplement No. 1 to the foregoing tariff was published, effective May 1, 1918 (Plaintiff-respondent's Exhibit D; Tr. 26–28).

This supplement, after setting forth (Tr. 27–28) the Commission's suspension order, including the portion just quoted, provided as follows (Tr. 28):

> In compliance with the above order, rules, and charges, provided on lower portion of page 4 of G. N. Ry. I. C. C. No. A–4524, G. F. O. No. 1240–A, are under suspension and

will not be applied until August 29, 1918, unless otherwise ordered by the Interstate Commerce Commission.

During period of suspension, no charge will be made on grain, seed (field), seed (grass), hay or straw, carloads, *held in cars, on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.*

Substitute the following for paragraph (*a*) under caption "Exception" shown on page 2 of tariff:

(*a*) Grain, seed (field), seed (grass), hay or straw, carloads, *held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.*

This supplement was in effect at the time the shipments moved and all parties concede that Exception (*a*) as provided in the supplement must be substituted for the Exception (*a*) appearing in the original tariff. The respondent, moreover, concedes (Tr. 34) that, were there no exception or suspension order, the $5 charge provided by Rule 10 would apply. The respondent contends, however, that Exception (*a*) as published in Supplement No. 1 canceled the $5 charge so far as it applied to these shipments. On the other hand, the petitioners' position is, as shown by questions and argument of counsel (Tr. 35–37) and the testimony of petitioners' expert (Tr. 44–50), that Exception (*a*) of Supplement No. 1 did not cancel the $5 charge provided by Rule 10 of the original tariff for the following reasons:

The shipments in question were billed from points in Iowa and Nebraska to Willmar, Minn., and were there inspected by the State grain inspectors, and then ordered reconsigned to Anoka, Minn., a point beyond (Tr 33–34, 46). Exception (*a*), it will be observed, was applicable only where grain was "held in cars on track for inspection and *disposition* orders incident thereto *at billed destination* or at point intermediate thereto." This grain was not held for *disposition* orders *at billed destination* or at any point intermediate thereto, but was held for *reconsignment* to Anoka, a point *beyond* billed destination.

In other words, it appears that the issue before the court was the construction to be given the word "disposition" and the phrase "at billed destination" as used in the published tariff, and that on that construction depended the applicability of the $5 charge. As has been already noted, the question as to which construction was correct is not before this court in this proceeding. The sole question is whether consistently with the *American Tie Company case*, *supra*, the court had jurisdiction to construe the meaning of the interstate tariff, there being a *bona fide* question as to its proper construction.

It should be noted, moreover, that while the petitioners are quite willing to rest their case on the lack of jurisdiction in any court to construe the meaning of any interstate tariff where the meaning is disputed, the court in this instance, not only undertook to construe the disputed meaning of the tariff provision, but of necessity undertook to con-

strue the meaning of the Commission's suspension order, since the very language of the tariff in dispute (Tr. 28) was copied verbatim from that of the suspension order (Tr. 28). In other words, the action of the court in this instance might well result in a collateral attack on the Commission's order itself, unless the Commission were first resorted to to determine the meaning of that order.

This brings the petitioners to the necessity of anticipating that the respondent may, as the respondent did before the Supreme Court of Minnesota, go outside the record and attempt to intrude into the case before this court certain alleged correspondence with the Interstate Commerce Commission which respondent contends contains a construction of the tariff provision in question. This correspondence consists of what purports to be a letter from the secretary of the Interstate Commerce Commission to the traffic manager of the Great Northern Railway Company, and a letter from Commissioner Eastman of the Interstate Commerce Commission to Mr. Chambers, Director of Traffic of the United States Railroad Administration.

It will suffice to say here that neither letter was offered in evidence nor is of record in this case; that the first letter was dated after the judgment of the trial court was entered, and that the second letter was written after the final decision of the case in which the suspension order of the Commission already referred to was issued, and that this letter referred, not to that suspension order, but to a proposed new rule carrying

t the Commission's final decision. Finally, that en assuming, contrary to the fact, that this corres-ndence contained a construction by the Commission the tariff provision in question, neither the plead-gs in this case, the judgment of the trial court, nor ie judgment of the Supreme Court, purport in any ay to be based upon any such construction. Indeed is expressly to be noted that the Supreme Court in s opinion did not even refer to the alleged construc-ion by the Interstate Commerce Commission, but ased its judgment solely upon its own construction f the tariff (Tr. 61).

Nor should it be overlooked that it is extremely loubtful under the *Clark case*, 238 U. S. 456, p. 470, whether a *State* court could in any event have juris-liction of an action based on a disputed question of tariff construction, without a precedent award of damages by the Commission, as well as a precedent determination of the proper construction.

With this statement of the essential facts, the petitioners will now proceed to a consideration of the decision of the Supreme Court of Minnesota herein, with a view to determining whether that decision is consistent with the decision of this court in the *American Tie case, supra*, and if not, whether it is warranted by any other decisions of this court, so as to require this court either to repudiate its decision in the *American Tie case*, or so to limit that decision as to make it inapplicable here.

BRIEF.

I.

The Supreme Court of Minnesota in holding that a disputed question of construction of an interstate tariff is within the jurisdiction of a court and does not require resort in the first instance to the Interstate Commerce Commission, not only directly contravenes the decision of this court in the case of Texas & Pacific Railway Company v. American Tie & Timber Company, 234 U. S. 138, but in addition is in contravention of, or inconsistent with, the following decisions of this court:

T. & P. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

B. & O. R. R. v. *Pitcairn Coal Co.*, 215 U. S. 481.

Interstate Commerce Commission v. *C., R. I. & P. Ry. Co.*, 218, U. S. 88.

Robinson v. *B. & O. R. R.*, 222 U. S. 506.

Interstate Commerce Commission v. *Union Pacific Railroad Co.*, 222 U. S. 541.

Interstate Commerce Commission v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88.

United States v. *Pacific & Arctic Co.*, 228 U. S. 87.

Mitchell Coal Co. v. *Pennsylvania Railroad Co.*, 230 U. S. 247.

Morrisdale Coal Co. v. *Pennsylvania Railroad Co.*, 230 U. S. 304.

Boston & Maine Railroad Co. v. *Hooker*, 233 U. S. 97.

Phillips v. *Grand Trunk Ry. Co.*, 236 U. S. 662.

Pennsylvania Railroad Co. v. *Clark Coal Co.*, 238 U. S. 456.

Loomis v. *Lehigh Valley Railroad Co.*, 240 U. S. 43.

Louisville & Nashville Railroad Co. v. *Ohio Valley Tie Co.*, 242 U. S. 288.

Northern Pacific Railway Co. v. *Solum*, 247 U. S. 477.

Director General v. *Viscose Co.*, 254 U. S. 498.

Minnesota Rate Case, 230 U. S. 352.

II.

Nor can the decision of the Supreme Court of Minnesota herein be justified under the decisions of this court in which, under the peculiar circumstances of the respective cases, this court has sustained the jurisdiction of a court over questions arising under the interstate commerce act of a character which this court has generally recognized to be primarily within the jurisdiction of the Interstate Commerce Commission:

Wight v. *United States*, 167 U. S. 512.

Southern Railway Co. v. *Tift*, 206 U. S. 428.

Interstate Commerce Commission v. *Illinois Central Railroad Co.*, 215 U. S. 452.

Louisville & Nashville Railroad Co. v. *Cook Brewing Co.*, 223 U. S. 70.

Galveston, Houston & San Antonio Ry. Co. v. *Wallace*, 223 U. S. 481.

Pennsylvania Railroad Co. v. *International Coal Co.*, 230 U. S. 184.

Florida East Coast Line v. *United States*, 234 U. S. 167.

Pennsylvania Railroad Co. v. *Puritan Coal Co.*, 237 U. S. 121.

Eastern Railway Co. v. *Littlefield*, 237 U. S. 140.

Illinois Central Railroad Co. v. *Mulberry Coal Co.*, 238 U. S. 275.

Philadelphia & Reading Railway Co. v. *U. S. and Allentown Portland Cement Co.*, 240 U. S. 334.

Pennsylvania Railroad Co. v. *Jacoby*, 242 U. S. 89.

Pennsylvania Railroad Co. v. *Sonman Coal Co.*, 242 U. S. 120.

Swift & Company v. *Hocking Valley Railway Co.*, 243 U. S. 281.

Pennsylvania Railroad Co. v. *Kitanning Co.*, 253 U. S. 319.

St. Louis, Iron Mountain & Southern Railway Co. v. *Hasty*, 255 U. S. 252 (State rates).

Central R. R. of New Jersey v. *Untied States*, — U. S. —, decided 12/5/21.

Schaff, Receiver, v. *Famechon*, — U. S. —, decided 2/27/22.

III.

The misconstruction or ignoring by State and subordinate Federal courts of the decision of this court in the American Tie case, supra, would seem to warrant this court in removing any possible doubt that its decision in that case requires resort in the first instance to the Interstate Commerce Commission to determine any disputed question of construction of an interstate tariff, that this requirement has in no way been modified, and that neither a State nor a Federal court has jurisdiction of such a question.

Reliance Elevator Co. v. *C., M. & St. P. Ry. Co.*, 165 N. W. (Minn.) 867.

[1] *Gustafson et al.* v. *Michigan Central Railroad Co.*, 129 N. E. 516.

[1] Does not cite *American Tie & Timber Co. case.*

Wolverine Brass Works v. *Southern Pacific Co.*, 153 N. W. 778.

[1] *National Elevator Co.* v. *C., M. & St. P. Ry. Co.*, 246 Fed. (8 Cir.) 588.

Francisconi v. *B. & O. R. R. Co.*, 274 Fed. (2 Cir.) 687.

[1] *Empire Refineries (Inc.)* v. *Guaranty Trust Co. of New York*, 271 Fed. 668.

IV.

The only two decisions of State or subordinate Federal Courts which have followed and applied the decision of this court in the American Tie & Timber case, supra, are:

Cheney v. *Boston & Maine Railroad Co.*, 116 N. E. (Mass.) 411;

Poor v. *Western Union Telegraph Co.*, 196 S. W. (Mo.) 28.

V.

The following decisions of State and subordinate Federal Courts with reference to the jurisdiction of the Interstate Commerce Commission and of the courts, respectively, over questions arising under the Interstate Commerce Act, were either rendered before the decision of this court in the American Tie case, supra,[2] or are distinguishable from that case upon the same general grounds under which the decisions of this court cited under point II hereof may be distinguished:

Hite v. *Central Railroad of New Jersey*, 171 Fed. 370 (1909);

National Pole Co. v. *C. & N. W. Ry. Co.*, 211 Fed. (7 Cir.) 65; (1/6/14).

[1] Does not cite *American Tie & Timber Co. case.*

[2] Dates given of decisions rendered prior to decision of this court in *American Tie & Timber Co. case.*

Gimbel Bros. v. *Barrett*, 215 Fed. (Dist. Pa.) 1004;

C. B. & Q. Ry. Co. v. *Feintuch*, 191 Fed. (9 Cir.) 482 (1910);

Kansas City Southern Ry. Co. v. *Tonn*, 143 S. W. (Ark.) 577 (1912);

Hardaway v. *Southern Ry. Co.*, 73 S. E. (S. C.) 1020 (1912);

Western & A. R. Co. v. *White Provision Co.*, 82 S. E. (Ga.) 644;

Southern Pacific Co. v. *Frye & Bruhn*, 143 Pac. (Wash.) 163;

St. L., S. F. & T. Ry. Co. v. *Roff Oil Co.*, 128 S. W. (Tex.) 1194 (1910);

Laing-Harris Coal & G. Co. v. *St. L. & S. F. Ry. Co.*, 15 I. C. C. 37.

ARGUMENT.

I.

The Supreme Court of Minnesota, in holding that a disputed question of construction of an interstate tariff is within the jurisdiction of a court and does not require an award by the Interstate Commerce Commission in the first instance, not only directly contravenes the decision of this court in the case of Texas & Pacific Railway Company v. American Tie & Timber Company, 234 U. S. 138, but in addition is in contravention of the cases cited under Point I of the brief herein. Furthermore, such a holding can not be justified under the decisions of this court cited under Point II of the brief.

In the case of *Texas & Pacific Railway Company* v. *American Tie & Timber Company* (234 U. S. 138) this court said:

It is not disputable that the pivotal question in the case was whether oak railway crossties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight, and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business, as developed in the testimony, it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy and upon which its decision therefore depends.

There is no room for controversy that the law required a tariff, and therefore, if there was no tariff on crossties the making and filing of such tariff conformably to the statute was essential. *And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute.* Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, *the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission. Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Pennsyl-*

vania R. R. Co., 230 U. S. 247; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304. No question is made as to the controlling effect of the doctrine as a general rule, but it is urged that it is not applicable to this case for the following reasons:

(*a*) The foundation upon which the doctrine rests, it is insisted, is the necessity of a uniform enforcement of the Interstate Commerce Act and the danger of diversity and conflict arising if questions concerning the existence of tariffs or their reasonableness, of discriminations and preferences were left to be originally determined by courts of general jurisdiction, thus giving rise to the possibility of one rule in one jurisdiction and another in another. But the argument proceeds to insist that upon the principle that where the reason for the application of a law ceases to exist the law itself ceases to apply, the settled construction of the act to regulate commerce, announced and enforced in the Abilene and other cases, has here no application because it is so plain that oak crossties were included in the lumber rate as fixed in the tariff of the railway company that there is no reason for proceeding primarily before the Commission, as there is no possibility of difference on the subject if left to the consideration of the courts. We need not pause to point out the palpable error of law which the proposition involves, since on the face of the record it is apparent that the assumption of fact upon which it rests is absolutely without foundation. We say this because nothing could more clearly demon-

> strate such result than does the conflict and confusion in the testimony concerning whether crossties were included in the filed lumber tariff. * * *

Just how this court could more clearly and unmistakably proclaim the jurisdiction of the Interstate Commerce Commission and the nonjurisdiction of the courts over a disputed question of tariff construction, it would be difficult to imagine. As the portion of the court's opinion which has been italicized shows, the sole question in the case was

> whether oak railway crossties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight,

and the court itself states:

> And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute * * * the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.

What, then, are the reasons which the Supreme Court of Minnesota has given for failing to apply in this case the law so established?

As has been noted, the decision of the Supreme Court of Minnesota herein, 180 N. W. 105 (Tr. 60), rests its affirmance of the jurisdiction of the trial

court to decide a disputed question of construction of an interstate tariff on the previous decision of that court in the case of *Reliance Elevator Company* v. *C. M. & St. P. Ry. Co.*, 139 Minn. 69 (165 N. W. 867). In the *Reliance case*, which was a suit for overcharges brought in a State court, the disputed question of construction was whether Strasburg, N. Dak., was an intermediate station between Linton, N. Dak., and Minneapolis, Minn., within the meaning of the interstate tariff reading as follows:

> Between stations on the C. M. & St. P. Ry. rates to and from intermediate stations will be the same as shown to or from the next more distant station to or from which rates are named.

The trial court had dismissed the case for lack of jurisdiction. The State Supreme Court, while holding that the trial court should have assumed jurisdiction, affirmed the dismissal of the suit on the ground that under the construction which the State Supreme Court itself put upon the tariff there was no overcharge. It is to be noted that this situation, as the State Supreme Court itself mentions in the last paragraph of its opinion, effectively prevented any review of the decision of the State Supreme Court.

That court, in discussing the question of jurisdiction, said:

> "Defendant contended in the trial court and also contends in this court that the interstate commerce law gave the Interstate Commerce

Commission exclusive jurisdiction over the questions in controversy; and that the courts, or at least the State courts, have no jurisdiction of the subject matter of the action.

(2, 3) It is thoroughly settled that the rates for interstate shipments named in the tariffs published and filed as required by the interstate commerce law, of the legal rates for such shipments, and can not be deviated from by either shipper or carrier until changed in the manner prescribed in that law; *and that a shipper who seeks to attack such published rates upon the ground that they are unreasonable or discriminatory or infringe the law in some other respect, must make his complaint to the Interstate Commerce Commission before he can resort to the courts*, for the reason that original jurisdiction over such questions has been withdrawn from the courts and vested in the Commerce Commission. *Texas & Pac. Ry. Co.* v. *Abilene Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Robinson* v. *B. & O. Ry. Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; *Mitchell Coal & Coke Co.* v. *Pennsylvania Ry. Co.*, 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472; *Texas & Pac. Ry. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255; *Loomis* v. *Lehigh Valley Ry. Co.*, 240 U. S. 43, 36 Sup. Ct. 228, 60 L. Ed. 517; *B. & O. Ry. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; *Morrisdale Coal Co.* v. *Pennsylvania Ry. Co.*, 230 U. S. 304, 33 Sup. Ct. 938, 57 L. Ed. 1494.

(4) *But where the validity of the published rate is conceded and the shipper merely seeks to recover an excess which he alleges that the carrier has exacted and collected over and above such published rate, section 22 of the Interstate Commerce law (U. S. Comp. St. 1916, Sec. 8595) saves to him the right to bring his action therefor in the State Court. Pennsylvania Ry. Co.* v. *Sonman S. C. Co.*, 242 U. S. 120, 37 Sup. Ct. 46, 61 L. Ed. 188; *Pennsylvania Ry. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; *Eastern Ry. Co.* v. *Littlefield*, 237 U. S. 140, 35 Sup. Ct. 489, 59 L. Ed. 878; *Illinois C. Ry. Co.* v. *Mulberry Hill Coal Co.* 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306; *Mitchell C. & C. Co.* v. *Pennsylvania Ry. Co.* 230 U. S. 247, 33 Sup. Ct. 916; 57 L. Ed. 1472; *Gimbel Bros.* v. *Barrett* (D. C.) 215 Fed. 1004; *Hite* v. *Central Ry. Co.* 171 Fed. 370, 96 C. C. A. 326; *Wolverine Brass Works* v. *Southern Pac. Co.*, 187 Mich. 393, 153 N. W. 778; *Western & Atlantic Ry.* v. *White Provision Co.* 142 Ga. 246, 82 S. E. 644; *Kansas City S. Ry.* v. *Tonn*, 102 Ark. 20, 143 S. W. 577.

(5) *In the present case the pleadings raised no question as to the validity of the rate fixed by the tariff, and the only issue presented for trial was whether defendant had collected an amount in excess of the prescribed rate. In National Elevator Co. against this same defendant, supra, the court held that the Federal court had jurisdiction to determine that question, and we are of opinion that the State court also has jurisdiction to determine it.*

The petitioners are frank to say that it is incomprehensible to them how the Supreme Court of Minnesota could have reached the conclusion that the considerations which it mentions, and which have been italicized, take either the *Reliance case*, or this case, out of the scope of the decision of this court in the *American Tie case*, which it will be noted the State Supreme Court specifically cites.

Indeed, the Supreme Court of Minnesota leaves entirely to inference the grounds upon which it assumes to distinguish the *Reliance case* from the *American Tie case*. It will be noted that the Supreme Court, without singling out the *American Tie case* in any way, merely cites that case among others in support of the proposition—

> that a shipper who seeks to attack such published rates *upon the ground that they are unreasonable or discriminatory or infringe the law in some other respect*, must make his complaint to the Interstate Commerce Commission before he can resort to the courts.

While the *American Tie case* is certainly authority for the proposition stated, it is by no means limited to a case where the rates are attacked upon the ground "that they are *unreasonable* or *discriminatory* or *infringe the law* in some other respect," as perhaps is true of the other cases cited by the State Supreme Court, with the exception of the *Loomis case*.

In the *American Tie case*, as has been seen, this court did not consider any question of unreasonable-

ness or discrimination or infringement of the law in any other respect. As this court itself said (p. 146):

> It is not disputable that the pivotal question in the case was whether oak railway crossties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight.

Moreover, while it is true that in analyzing the complaint in that case, this court said (pp. 142, 143):

> The petition charged, however, that the joint through lumber rate above referred to and the rate of 24 cents thereby established included oak ties, and that the railway's refusal to provide cars and to carry the ties at its published rate was an unjust and unreasonable discrimination against the Tie Company, against the several places on the railway company's line where the ties had been accumulated, and against the ties as an article of commerce, * * *. It was alleged that the refusal to transport the ties had resulted in unreasonable prejudice and disadvantage to the Tie Company and to the traffic in ties, and in benefit to the railway company as a purchaser and consumer of crossties, all of which constituted a violation of the act to regulate commerce.

this court dismissed the case without further reference to the irrelevant allegation of discrimination, because this court concluded (p. 146):

> That the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by

> the statute. * * * The courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.

The petitioners are loath to conclude, therefore, that the Supreme Court of Minnesota believed this incidental and irrelevant allegation of discrimination, which this court did not even consider, to be, nevertheless, the controlling principle of the decision of this court in the *American Tie case*. As has been said, that court leaves entirely to inference just what consideration it gave that case. The petitioners, therefore, are forced to the conclusion that, unless the Supreme Court of Minnesota entirely misconstrued that case, that court must have considered the doctrine of that case to have been repudiated or limited by the cases which that court cites under Point (4) of its opinion.

The petitioners feel justified, therefore, in assuming that it has been clearly shown that the *American Tie case* definitely and without qualification requires resort in the first instance to the Interstate Commerce Commission to determine a disputed question of construction of an interstate tariff, and prohibits a court from assuming jurisdiction of such a question; and that it has been further shown that neither this case nor the *Reliance Elevator case* is distinguishable from the *American Tie case*.

Two questions remain in this connection:

(*a*) Do the decisions of this court cited under Point I of the brief justify and support the doctrine of the *American Tie case*?

(*b*) Do the decisions of this court cited under Point II of the brief in any way limit or qualify the doctrine of the *American Tie case*, or are they distinguishable from that case, and, therefore, equally distinguishable from the case at bar and from the *Reliance Elevator case*?

(a) The decisions of this court cited under Point I of the brief fully justify and support the doctrine of the American Tie case.

The *American Tie case*, it has been seen, requires resort to the Interstate Commerce Commission in the first instance to determine a disputed question of construction of an interstate tariff, and prohibits a court from assuming jurisdiction of such a question. In that portion of the court's opinion which has already been quoted, the court gives both the reason for this holding and the authorities in support of it. This court says (p. 146):

> "Indeed we think it indisputable that that subject is directly controlled by the authorities, which establish that *for the preservation of uniformity* which it was the purpose of the act to regulate commerce to secure, the courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Interstate Commerce Commission. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Balt. & Ohio R. Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *Baltimore & O. R. Co.*, 222 U. S. 506; *Mitchell Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304."

It will be noted that the reason which this court gives for the primary jurisdiction of the Interstate Commerce Commission over a disputed question of tariff construction is—

> *the preservation of the uniformity* which it was the purpose of the act to regulate commerce to secure.

The petitioners most respectfully submit that this essential of uniformity not only has been, but should continue to be, the controlling consideration by which this court must determine the necessity of primary recourse to the Commission. The petitioners, moreover, submit that whatever apparent conflict there may be in the decisions of this court on the question, it is, or should be, soluble by the application of this test. This essential of uniformity was the principle underlying and justifying the decision of this court in the first case in which the question arose, the *Abilene case* (204 U. S. 426), and it has been the principle and the test by which this court has solved the numerous variations of this jurisdictional question as they have arisen.

In the *Abilene case*, the Court of Civil Appeals of Texas had upheld the jurisdiction of a State court over a suit to recover alleged unreasonable rates charged on an interstate shipment of cotton seed. It was urged that this right of action was preserved in the courts under sections 9 and 22 of the Interstate Commerce Act. This court, referring to those sec-

tions of the act, at pages 438 and 439 of its opinion, states:

> By the ninth section of the act it was provided as follows:
>
> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"
>
> And by section 22, which we shall hereafter fully consider, existing appropriate common law and statutory remedies were saved.

The pertinent provisions of section 22 as quoted by this court (p. 446 of its opinion) read:

> * * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

This court, after noting that it was beyond doubt that an action could be maintained at common law against a carrier to recover unreasonable charges, proceeds as follows (p. 436, 437):

> As the right to recover, which the court below sustained, was clearly within the prin-

ciples just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Both parties concede that the question for decision has not been directly passed upon by this court, and that its determination is only persuasively influenced by adjudications of other courts. They both hence mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

This court then goes on to discuss the purposes which the Interstate Commerce Act was intended to serve, the principal one, as shown by this court, being the prevention of discrimination by the iron-

clad requirement that the published rates be adhered to. After referring to sections 9 and 22 of the act, as already noted, this court says (pp. 439, 440):

> That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. * * * *And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all* and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. * * *.
>
> When the general scope of the act is enlightened by the considerations just stated, it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discriminations. *This follows, because unless the requirement of a uniform standard of rates be complied with* it would result that violations of the statute as to preferences and discrimination would inevitably follow.

This court then proceeds to demonstrate the obvious impossibility of uniformity if the various courts were allowed to indulge their respective ideas as to the reasonableness of a particular rate, and the equal lack of uniformity which would result if both the courts and the Commission had coordinate jurisdiction, and says (p. 442):

> In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.

Referring to section 22 of the act, the court then says (p. 446):

> But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the act to regulate commerce, viz: "* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, can not in reason be construed as

> continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act can not be held to destroy itself.

Further quotation from the *Abilene case* would unduly extend this argument and would only afford cumulative evidence of what is already abundantly clear; that is, that the necessity of uniformity was the compelling consideration which actuated this court in holding that the broad provisions of sections 9 and 22 of the act to regulate commerce, retaining to the courts their jurisdiction and to the shippers their common law remedies, are by necessary implication limited so as to require resort in the first instance to the Commission where uniformity is essential.

The necessity of uniformity, moreover, is the controlling principle of the four other decisions, in addition to the *Abilene case*, which this court cites in the *American Tie case* in support of its application of that test to the primary jurisdiction of the Commission. Again, to avoid undue extension of the argument, petitioners will content themselves with merely referring the court to the pages in the respective reports of those cases which demonstrate that those decisions were controlled by this test of uniformity.

In *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.* (215 U. S. 481) this court applied this test in denying the jurisdiction of a court under section 23 of the Act,

to mandamus a carrier so as to compel it to furnish cars on the ground of discrimination in the rules and practices of the carrier in this respect. This court held that the broad provisions of section 23 of the act, conferring upon the Federal courts the right to mandamus carriers to compel the furnishing of cars, were, for the same considerations of uniformity which had controlled its decision in the *Abilene case* with reference to the equally broad provisions of sections 9 and 22, by necessary implication again limited so as to require recourse to the Commission in the first instance. (See pp. 494–495 and p. 498.)

In *Robinson* v. *Baltimore & Ohio R. R. Co.* (222 U. S. 506) this court again applied the test of uniformity in holding that a court had no jurisdiction of an action for alleged discrimination in the publication of different rates on coal depending on whether the coal was loaded into the car from wagons or from the tipple. The court, further quoting the *Abilene case*, held (p. 511) that there was no difference in this respect between an action for damages based on alleged discrimination in rates, and one based on the alleged unreasonableness of rates (see also last paragraph, p. 509 and top of p. 510).

In *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.* (230 U. S. 247) the court applied this test of uniformity to an action for alleged discrimination by rebates from the published rate, alleged to have been made to a competitor in the guise of section 15 allowances. (See pp. 255–257.)

Moreover, this court in its decision in the *Mitchell case* disposed of the contention that whatever necessity there might be for uniformity in the prescription of rates and practices for the future, no such necessity existed with reference to the award of damages for the past, and therefore that there was no reason for primary recourse to the Commission in an action merely for damages. (See pp. 258–260.) In this connection, it should be noted that while this court in the *Abilene case* was considering a suit for damages for the past exaction of alleged unreasonable rates, it did not in its opinion specifically discuss the question as to whether any difference existed between such a case and one involving the prescription of rates for the future.

Finally, in *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.* (230 U. S. 304) the last case cited by this court in support of its doctrine in the *American Tie case*, this court, without specific reference to the necessity for uniformity, but citing the *Abilene*, *Pitcairn*, and *Robinson cases*, denied the jurisdiction of a court to award damages for alleged unfair distribution of coal cars to it and an undue allotment to a competitor. In this connection, notice should perhaps be taken of the contention of the plaintiff that the suit was actually one for damages for violation of the carrier's own rule, and that therefore there was no necessity of primary recourse to the Commission. It will suffice to say, however, that this court finds it unnecessary to decide, had such been actually the

case, whether primary resort to the Commission would have been necessary, since this court states (p. 314):

> On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable.

We refer to this question here, however, because it will subsequently be necessary to consider whether an action may be maintained in court based upon a departure from the carrier's own rules if there is no attack upon the rules themselves.

This examination of the authorities cited by this court in the *American Tie case* clearly supports the controlling effect given by this court in that case to the necessity of uniformity in tariff construction as the test for requiring primary recourse to the Commission. As has already been noted, it is the petitioners' contention that the essential test of the primary jurisdiction of the Commission is whether the question in dispute requires uniformity of decision in order to insure that uniformity in rates and services which has been recognized by this court itself, to be the essential result which the interstate commerce act was intended to secure. Moreover, as has been noted, the petitioners believe that any apparent confusion in the decisions of this court on the question of the jurisdiction, respectively, of the courts and of the Commission has arisen either because this requisite of uniformity as a test of

jurisdiction has been departed from or, if in fact applied, has at times been overlaid by other and accidental considerations.

Your petitioners most respectfully submit that this has been true even in connection with the remaining decisions of this court cited under Point I of the brief as in general supporting the doctrine of the *American Tie case*. Practically, if not without exception, those decisions in rejecting the jurisdiction of the courts over the particular questions involved cite the *Abilene*, the *Pitcairn*, the *Robinson*, the *Mitchell*, and the *Morrisdale cases*, and therefore, inferentially at least, incorporate the foundation upon which each of those decisions expressly rests, the necessity of uniformity as the test of the primary jurisdiction of the Commission. It must be admitted, however, that in certain of them this test is not expressly applied, and, indeed, that other and less valid grounds are made the specific basis of the court's decision. A critical analysis, however, of the respective cases will disclose that all of these decisions are, or can be justified under this test, and that by this test alone can they be harmonized.

Indeed, in this respect it is necessary to return to a further consideration of the *Mitchell Coal case* itself. As has been seen, this court, on pages 255 to 257, expressly based its decision that the Commission had primary jurisdiction of an action for alleged discrimination through rebates from the published rate in the guise of section 15 allowances, upon the necessity of uniformity of decision as to the reasonableness of

the allowances. On page 257, however, the court says:

> The claim that this conclusion nullifies section 9 is concretely answered by the fact that the court has just decided to the contrary in *Pennsylvania Railroad* v. *International Coal Co.* There the carrier insisted that a suit for damages occasioned by rebating could not be maintained without preliminary action by the Commission. This contention was overruled and it was held that for doing an act prohibited by the statute the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting departure from the tariff to the facts of the case. But where a suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is reasonable and therefore prohibitive. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question.

The petitioners most respectfully submit that this, however, is not the fundamental distinction between the *International Coal case* (230 U. S. 184) and the *Mitchell case*. The real distinction between these cases is that in the *International Coal case* the carrier did not deny the departure from the published tariff, while in the *Mitchell case*, on the contrary, the carrier denied that there was any departure, and alleged that the allowance was only reasonable compensation for the performance by the

shipper of a service which the carrier was bound to perform under its published tariffs. In other words, in the *International Coal case*, it being admitted that the published tariff was departed from, there was no necessity of primary recourse to the Commission, because uniformity was insured by adherence to the published tariff, the meaning of which was not in issue. Further consideration will be given to the *International Coal case* in connection with Point II of this brief. It will suffice to say here that there was nothing in that decision which would indicate that this court would still have sustained the jurisdiction of the trial court had there been any denial of the departure from the published tariff.

On the other hand, in the *Mitchell case*, the very first question with which the court was confronted was, Was the service for which the allowance was made included in the carrier's obligations under the published tariff? and on this question, and not on the question of the reasonableness of the allowance, did the Commission's primary jurisdiction fundamentally attach. The question of the reasonableness of the allowance could only arise in the event the services for which the allowance was made were services which the carrier was obligated to perform under the tariff. If they were not, any allowance, however reasonable otherwise, would have constituted a departure from the tariff and a rebate.

Indeed, this court itself recognized that no allowance whatever could be made unless the carrier were

bound to perform the service. The court says (pp. 262–264):

> But although the statute then in force was not construed to require the publication of allowances, their payment was lawful only when supported by a consideration. To pay shippers for doing their own work would have been a mere gratuity, and if the carrier was not bound to haul from the mine it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot.

Moreover, this court specifically noted that the question of the limits within which the rates applied was a question in connection with which the Commission alone could act, but failed to recognize the controlling significance of this question, rather than that of the reasonableness of the allowance. The court says (pp. 263–264):

> In case any question arose as to the reasonableness of the practice, *the limits within which the station rate should apply* or the reasonableness of the allowance paid those shippers who supply motive power, the Commission alone could act.

The court nevertheless, therefore, goes on to ignore that the controlling question was whether the service was included in the tariffs, and on page 266, again referring to the *International Coal case* in connection with certain complainants in the *Mitchell case* itself, who had no engines and performed no service but

nevertheless received allowances, undertakes to distinguish the *International Coal case* and these latter complainants from the *Mitchell case* generally, on the ground that the departure from the tariffs being prohibited by law it was not necessary to have any preliminary decision to that effect by the Commission. In other words, the court again fails to recognize that in the *Mitchell Coal case*, had there been a departure from the tariff, it was equally prohibited by law, but that the primary question which the Commission and not the court had to decide was whether there had been such a departure, and that it is this which distinguishes the *Mitchell case* generally from the *International Coal case* and from the other complainants in the *Mitchell case* itself, where the departure was admitted.

The *Mitchell Coal case*, therefore, correctly understood, is not only consistent with the doctrine of the *American Tie case*, but in reality is in principle, and in the controlling question decided, upon all fours with the *American Tie case*. It can not be too clearly understood that the primary jurisdiction of the Commission in the *Mitchell Coal case* rested essentially on the necessity of uniformity in the construction of a tariff, and that while this court somewhat obscured this fact by giving what would seem to be undue prominence to other considerations, it did in fact recognize this question as being one for the Commission to decide.

It is to be regretted, in this connection, that considerations of space forbid more detailed analysis of

Justice Pitney's dissent. There are, however, one or two comments which it may be helpful to make. Not the least difference between Justice Pitney and the majority of the court would seem to have been based on the majority's conclusion that under the act as it then stood it was not necessary to the legality of an allowance that it be published. Fundamentally, however, Justice Pitney would seem to have dissented on three grounds:

> (1) Because as shown (p. 69) he considered the *Abilene* and the *Robinson cases* as applying only where the published tariff was observed and not where the published tariff was departed from.

In this Justice Pitney failed, as did the majority, to recognize clearly that the very question upon which the Commission's primary jurisdiction rested in the *Mitchell case* was whether the tariff had been departed from. (See also p. 279.)

> (2) That the *Abilene, Robinson* and *Pitcairn cases* (p. 270) while proper to apply to administrative questions for the future, did not properly apply to judicial questions for past wrongs.

The petitioners most respectfully suggest that Justice Pitney either must have meant to disagree with the *Abilene case* or have overlooked the fact that that case dealt entirely with damages for past wrongs. More particularly, however, Justice Pitney overlooked the controlling consideration in the *Abilene, Pitcairn* and *Robinson cases,* that is, that the necessity of uniformity was as great in the past as in the future,

and that therefore the Commission's primary jurisdiction was equally essential. This, as has been already noted, the majority of the court in the *Mitchell case* clearly recognized (pp. 258–260). The portion of Justice Pitney's dissent, however, with which the petitioners are most concerned is his statement on page 281:

> (3) "It is said that the questions that arise about these practices of rebate and car distribution are complicated and difficult. Certainly that objection is not pertinent to the present cases. I see nothing beyond the grasp of a court of law in the *Mitchell case*."

Again, with all due respect, the consideration of difficulty and complication in these questions is only secondary. It might even be conceded that the Commission would be less qualified than a particular court to reach a right conclusion on a particular question. That, however, is not the test. There are hundreds of courts and only one Commission, and whether the Commission's decisions be right or wrong, to give controlling effect to its decisions will obviously assure the essential of uniformity, if nothing else. It is this necessity of uniformity, not of difficulty, not of intricacy, not whether the courts or the Commission are most likely to be right or wrong, which compels resort to the Commission in the first instance.

Passing to the case of *Pennsylvania Railroad* v. *Clark Coal Co.* (238 U. S. 456) it will be found that this court again cites the *Abilene*, the *Pitcairn*, the

Robinson, the *Morrisdale*, and the *Mitchell cases*, in denying the jurisdiction of a State court to entertain a suit under a State statute for treble damages for discrimination in car service, the suit having been instituted after the plaintiff had obtained a finding of discrimination from the Interstate Commerce Commission, but before the Commission had made its formal award of damages.

This case is of particular interest because it supplements the decision in the *Abilene case* as to the jurisdiction retained by the courts under section 9 of the act. On page 470 of its decision, the court holds that where, as in that case, primary resort had been had to the Commission to determine the administrative question involved, the plaintiff need not, unless he chose, proceed to obtain an award of damages from the Commission, but might exercise his election under section 9 to sue in court upon the Commission's finding. The court held, however, that, should he so elect, he was limited by the specific terms of section 9 to suit in a Federal court, and could not sue in a State court unless he first obtained an award of damages from the Commission, when under section 16 he could proceed to enforce such an award in any State or Federal court of competent jurisdiction. This holding makes clear that the doctrine of this court in the *Abilene case* does not in fact render nugatory the specific provisions of sections 9 and 22, preserving to claimants their common-law forums and remedies, but, on the contrary, that a real election as to the final forum in which a claimant

may enforce his rights is effectively preserved, conditioned only on resort first being had to the Commission, where the question involved demands uniformity of decision.

It is, however, desired to make particular reference here to that portion of this court's opinion in the *Clark case* in which this court undertakes to distinguish that case from the *Puritan case* (237 U. S. 121), and the *Mulberry Hill case* (238 U. S. 275), in both of which the jurisdiction of State courts was sustained to entertain suits for damages for inadequate and discriminatory car distribution without preliminary resort to the Commission. On pages 471 to 473 of the opinion of this court in the *Clark case*, it distinguishes the *Puritan case* and the *Mulberry Hill case* on the ground that in the *Clark case* the plaintiff itself had in the first instance invoked the jurisdiction of the Commission, while this had not been done in either of the other cases. Again, with due deference, this distinction, although true, is not the fundamental distinction between the cases. The question in the *Clark case* was whether the rule or method of car distribution of the carrier was unjustly discriminatory, and this court itself clearly recognized (pp. 468 to 469) that even if the plaintiff had not of its own accord proceeded in the first instance to obtain a finding on this question from the Commission, the Commission must in any event have been first appealed to before an action could have been maintained in court. In this connection it will be noted that this court specifically cites the

Abilene, the *Pitcairn*, the *Mitchell* and the *Robinson cases*.

On the other hand, the *Puritan case*, as will be further developed, passed off largely on a question of pleading, and while even though there are other grounds upon which the validity of this court's decision in that case may be questioned, it is clearly distinguishable from the *Clark case* on this ground alone.

This court construed the complaint in the *Puritan case* as claiming damages by reason of the carrier's failure to furnish the plaintiff cars to which it was entitled under the carrier's own rule. (See p. 134 of the opinion.) The carrier made no affirmative defense whatever, but contented itself with a plea to the jurisdiction of the court. In other words, on the pleadings this court was justified in assuming that the carrier admitted the violation of its own rules and that there was therefore no administrative question for the Commission to pass upon, since presumably uniformity would have been obtained by the carrier's adherence to those rules. The *Puritan case* will be further discussed in connection with the cases cited under Point II of the brief, and it will there be pointed out that it is at least doubtful, even on this assumption, whether there should not be preliminary reference to the Commission, since the carrier's own rules might themselves be discriminatory. But in any event it is clear that the real ground of distinction between the *Puritan* and the *Clark cases* is analogous to the distinction already pointed out between

the *International Coal* and the *Mitchell cases*—that is, that in the *Puritan case* the departure from the carrier's own rules was admitted, while in the *Clark case* it was denied, just as in the *International Coal case* the departure from the carrier's own tariffs was admitted, while in the *Mitchell case* it was denied.

Consideration of the *Mulberry Hill case* will be postponed to its consideration in connection with the cases cited under Point II of the brief. It will suffice to say here that this court, in the *Mulberry Hill case*, failed to recognize what it distinctly commented upon in the *Eastern Railway case* (237 U. S. 140, at p. 143), that its decision in the *Puritan case* was based on the character of the pleadings.

Coming to the *Loomis case* (240 U. S. 43), we find this court requiring preliminary recourse to the Commission under circumstances which go even beyond the doctrine of this court in the *American Tie case*. In the *Loomis case*, a shipper of grain sued to recover the cost of grain doors and bulkheads which it had furnished, and which were alleged to have been necessary because of the failure of the carrier to provide suitable equipment. This court notes, on page 48 of its opinion, that—

> The applicable duly filed interstate rate schedules made no reference to allowances for grain doors or bulkheads. * * * Whether there is jurisdiction in the State court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration.

This court will note from the portion of the quotation which has been italicized that there was apparently no contention in the *Loomis case* that the tariffs provided for any allowances, while in the *American Tie case* it was contended that the tariffs provided a rate on oak crossties. Had this court, therefore, logically carried out the theory of its decisions in the *International Coal case* and in the *Puritan case*, it might well have held in the *Loomis case* that there was no question to be submitted to the Commission, but that the case should be dismissed on its merits. Instead, however, this court held, in the *Loomis case*, that even though the tariffs as stated by this court "made no reference to allowances" preliminary resort must still be had to the Commission to determine whether such allowances could be made consistently with the tariff, primarily in the interest of uniformity, and secondarily, because of the technical nature of the questions involved. In so holding this court, as already noted, would seem to have gone even beyond the strict limits of its doctrine in the *American Tie case*, and therefore even beyond the doctrine which the petitioners contend should control in the case at bar, since here, as in the *American Tie case*, the actual meaning of the tariff is in dispute.

Before leaving the *Loomis case* the petitioners desire to call attention to a further feature of that decision.

In the *Loomis case*, this court, after referring to the *Abilene*, the *Pitcairn*, the *Robinson*, the *Mitchell*, the *Morrisdale*, the *Minnesota Rate cases*, the *American Tie case*, the *Puritan case*, and the *Clark case*, says:

> An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation, and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or a character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant case presents a problem which directly concerns rate making and is peculiarly administrative. * * * And the preservation of uniformity and prevention of discrimination rendered essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court.

It will be noted that in this decision this court required resort to the Commission "to define services covered by a carrier's published tariffs," not only because of the necessity of uniformity, but secondarily because of the intricacy of the questions involved. Indeed, in the *American Tie case*, this court had already recognized this secondary reason for preliminary recourse to the Commission. In that case this court said (p. 146):

> And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power

concerning tariffs and the authority to regulate conferred upon it by the statute.

As a matter of fact, this secondary consideration of the intricacy of the questions involved, and the Commission's peculiar equipment to solve them, is in truth but a phase of the primary consideration of uniformity. The presumption might be indulged in theory, however unjustifiable in practice, that even though there is only one Commission and there are many courts, all would reach the same conclusion, if all had equal acquaintance with, and facilities for solving the peculiar administrative questions involved. The fact, therefore, that the Commission has an acquaintance with and facilities not open to the courts for the solution of these questions, is in effect only an additional reason why for the sake of uniformity such questions must in the first instance be submitted to the Commission. That this is peculiarly the case in connection with the construction of tariffs will be subsequently further elaborated.

In the case of *Northern Pacific Railway Co.* v. *Solum* (247 U. S. 477) this court holds that before damages can be recovered in a State court for alleged misrouting by failure to send a shipment via a lower rated state, instead of a higher rated interstate, route, recourse must first be had to the Commission to determine whether in fact there was misrouting. In that case this court says (p. 483):

> The shipper, on the other hand, urges that the rule which requires such preliminary

> determination of administrative questions by the Commission applied only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory, but the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate. Citing, among other cases, *Texas & Pacific Railway Co.* v. *American Tie & Timber Co., supra.*

Here again, therefore, this court reaffirms the principle upon which the *American Tie case* is founded and repudiates the very contention here made by the respondents, that that principle applies only where it is contended a particular rate is unreasonable or a particular practice discriminatory.

Finally, in the case of *Director General* v. *Viscose Co.* (254 U. S. 498) this court, in setting aside an injunction against the filing of a tariff canceling rates on silk so as to include silk among articles which will not be accepted for shipment, said, citing the *American Tie case* among others:

> The importance to the commerce of the country of the exclusive initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and can not be overstated.

It is not necessary to refer in detail to the remaining cases cited under Point I, with the exception of the case of *United States* v. *Pacific & Arctic Co.* (228 U. S. 87), to which further reference will presently be made. Enough to say that they are in

general consistent with the *American Tie* and *Abilene cases* in holding that there must be preliminary recourse to the Commission to determine administrative questions, and that the jurisdiction of the courts in enforcing rights in connection with such questions is confined to the subsequent enforcement of such rights under sections 9 and 16 of the act, or to the review of the Commission, the latter, however, solely where the Commission has exceeded its delegated powers or has acted under mistake of law, or arbitrarily in the absence of any competent evidence.

Sufficient, it is hoped, therefore, has been said to demonstrate:

(1) That the *American Tie case* clearly and unmistakably requires preliminary resort to the Commission to determine a disputed question of tariff construction.

(2) That this requirement is based primarily on the necessity of uniformity in the decisions of such questions, and secondarily, on considerations of the intricacy of the questions themselves and, the Commission's peculiar opportunities for familiarity with them, and facilities for determining them.

(3) That while a superficial consideration of the decisions of this court subsequent to the *American Tie case* might lend some color to the contention that the original scope of that decision has since been modified, even by the decisions of this court consistent in result with that decision, more careful

analysis of those decisions demonstrates, on the contrary, that they are fundamentally consistent with the full scope of the doctrine of the *American Tie case* and in no way limit that doctrine.

Consideration, therefore, will now be given to the question of whether that doctrine has in any way been limited by the decisions of this court cited under Point II of the brief, or whether such decisions are distinguishable from the *American Tie case*.

(b) The decisions of this court cited under Point II of the brief in no way limit or qualify the doctrine of the American Tie case, but are distinguishable from that case and, therefore, equally distinguishable from the case at bar and from the Reliance Elevator case.

The decisions cited under Point II of the brief comprise not only all of the decisions of this court which the Supreme Court of Minnesota cites under Point IV of its opinion in the *Reliance Elevator case*, supra, but in addition other decisions of this court, some of them subsequent to the *Reliance case*, in which, under the peculiar circumstances of the respective cases, this court has sustained the jurisdiction of a court over questions arising under the Interstate Commerce Act, of a character which this court has generally recognized to be primarily within the jurisdiction of the Commission. A brief analysis of these decisions will, therefore, now be undertaken, to show that they in no way limit or modify the doctrine of this court in the *American Tie case*, but are clearly distinguishable from that case and, therefore, from the case at bar.

It would seem that the simplest way of making this analysis would be to consider such decisions in chronological order.

In *Wight* v. *United States* (167 U. S. 512) this court sustained an indictment for the violation of section 2 of the act by reason of the Baltimore & Ohio Railroad allowing one Bruening 3½ cents per hundredweight for hauling his shipments of beer from the Baltimore & Ohio depot to his warehouse. The shipments originated in Cincinnati and could have been carried over either the Panhandle or the Baltimore & Ohio to Pittsburgh, the Panhandle having a direct track connection with Bruening's warehouse, but the Baltimore & Ohio being only able to make delivery by truck. The alleged violation of section 2 was in the making of such allowances by the Baltimore & Ohio to Bruening without making similar allowances to all other consignees at Pittsburgh. No point was made of record, nor did this court discuss the question, as to whether there should have been preliminary resort to the Commission to determine whether the services to the several consignees were in fact similar. Indeed, it would appear from this court's opinion, though it is not expressly stated, that the allowance was not published; and it would appear from the opinion of this court in the *Mitchell case* (230 U. S. 247, at p. 260), where the *Wight case* is referred to, that this court construes the *Wight case* as being based upon the admitted departure from the published tariffs. It must be remembered in this connection, however,

that the indictment was for a violation of section 2 and not of section 6, and therefore it would seem more probable that the attention of this court in this early case, not having been called to any question of the court's jurisdiction, this court did not, in fact, consider that question.

In the case of *Southern Railway Co.* v. *Tift* (206 U. S. 428) this court sustained an injunction against the enforcement of unreasonable rates. This injunction was granted before 1906, and therefore before the Interstate Commerce Act afforded the Commission any way of compelling a carrier to desist from charging the rate condemned, and was in fact granted to enforce a precedent finding by the Commission that the rates were unreasonable. It is to be noted, moreover, that the Federal court which finally granted the injunction refused to do so until the Commission had been appealed to and had made its finding. There is another aspect of the case which likewise requires consideration. The Supreme Court, in addition to affirming the jurisdiction of the Federal court to enjoin the charging of the rates condemned by the Commission, sustained the jurisdiction of that court to require "restitution" during the period in which those rates were in effect. The order of "restitution" was expressly sustained on the ground of a stipulation to that effect between the parties, and this court in the *Pitcairn case* (215 U. S. 481, at p. 500) distinguished the "restitution" in the *Tift case* on the basis of this stipulation. It is not necessary to con-

sider whether under the law as it now stands this court would permit such a stipulation.

In *Louisville & Nashville Railroad Co.* v. *Cook Brewing Co.* (223 U. S. 70) this court sustained an injunction restraining a carrier from refusing to accept interstate shipments of beer to local option points in Kentucky. It appeared that the carrier had filed with the Interstate Commerce Commission a circular notice directing its agents to refuse to receive such shipments. The court says (pp. 83 to 84):

> The fact that the circular notice of the company referred to was filed with the Interstate Commerce Commission is incidentally stated in the answer of the company, and this fact is now made the basis for an argument that neither the State court nor the Circuit Court had any jurisdiction, and that an application should have been made to the Interstate Commerce Commission for an order requiring the railroad company to desist from refusing to transport such articles in interstate commerce.
>
> Why should the brewing company have made complaint to the Commission? What relief could it afford? *There was no tariff question.* There was no discrimination against shipments tendered by complainant and like shipments tendered by other brewers to the same points. There was no claim that the commodities tendered were inherently dangerous to transport, or that the railroad company did not have transportation facilities. Evansville was not discriminated against in

favor of like shipments to the same points. To say that there was a discrimination between shipments of intoxicants and other commodities does not make a case of discrimination or preference where the denial of such shipments is based, as is the case here, wholly and solely upon an illegal restraint upon that kind of interstate commerce, is to reason in a circle, for the question comes back at last to the validity of the law forbidding such shipments. There was no discrimination if the law was valid, and the result must turn, not upon any administrative question or questions of fact within the scope of the power of the Commission, but upon the validity of the legislation which controlled the action of the carrier. That is a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body.

The decision in the case of *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.* (204 U. S. 426), is not applicable here. The question there was one of the reasonableness of a rate. Such a question is primarily one of administrative character, and the propriety of a prior resort to the Commission to obtain a ruling upon the question of reasonableness involved the very heart of the whole statute. That there might be uniformity in rate making necessarily required a resort to that body as a basis for a common law recovery of an excessive charge.

It will be noted that this court specifically states that "there was no tariff question" involved. Appar-

ently, therefore, this court did not treat the circular filed with the Commission as a tariff. If it had so considered it, the case would then have been indistinguishable from the case of *Director General* v. *Viscose Company* (254 U. S. 498), already discussed, and it must be assumed that this court would, in such event, have required primary recourse to the Commission.

In the case of *Galveston, Harrisonburg & San Antonio Railway Co.* v. *Wallace* (223 U. S. 481) it was merely contended that under section 9 of the Interstate Commerce Act a State court had no jurisdiction of an action for damages for nondelivery of a shipment, but that there was exclusive jurisdiction in the *Federal courts*. This court says (pp. 489 to 490):

> It was contended that *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.* (204 U. S. 426) ruled that this jurisdiction was exclusive, and from that it was argued that no suit could be maintained in a State court on any cause of action created either by the original act of 1887 or by the amendment of 1906. But damage caused by failure to deliver goods is in no way traceable to a violation of the statute, and is not, therefore, within the provisions of sections 8 and 9 of the act to regulate commerce. *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 208.

It will be noted that there was no question before the court as to whether preliminary recourse to the Commission was necessary. It would seem clear,

however, that in such an action there would be no considerations of uniformity which would require such preliminary resort to the Commission. It should be noted, moreover, that in the case of *Louisville & Nashville Railroad* v. *Ohio Valley Tie Co.* (242 U. S. 288), cited under Point I of the brief, it was held that the Commission, in awarding damages for a violation of section 1 of the act in the charging an unreasonable rate, had jurisdiction to award any incidental damages which the complainant might have suffered to its business, and that the satisfaction of the Commission's award barred a subsequent action in court for such additional damages.

In the case of *Pennsylvania Railroad* v. *International Coal Co.* (230 U. S. 184) this court sustained the jurisdiction of a Federal court to award damages because of rebates paid other shippers from the published rates, but reversed the judgment awarding damages on the ground that there had been no proof of actual damage, and that the mere payment of rebates to other shippers did not *ipso facto* establish damage to the extent of the difference between the published rates charged the plaintiff and the reduced rates charged the other shippers.

The only question with which we are here concerned, however, is the holding of this court that a court had jurisdiction of such an action. This case has already been referred to in connection with the discussion of the *Mitchell Coal case* under the preceding heading of this argument, where petitioners

undertook to show that this court in distinguishing this case from the *Mitchell case* had not reached the fundamental distinction. It was there pointed out that the real distinction between the cases was that in this case the departure from the published tariff was admitted, and that there was, therefore, no necessity of primary recourse to the Commission, because presumably uniformity was insured by adherence to the published tariff, while in the *Mitchell case* the departure from the published tariff was denied, which, in order to insure uniformity, required preliminary recourse to the Commission to determine whether there had been such departure.

In the *International Coal case,* moreover, the defense was not that there had been no departure from the published rate, but merely that there was no discrimination because of the difference in services to the respective shippers. This court rightly holds (p. 196 to 197) that the question as to whether there might properly have been a difference in the rates for the respective services could not have been considered either by the Commission or the court, because such difference was not recognized in the only way in which it could have been legally done; that is, by the publication of different rates. This court says (p. 196):

> Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with

> service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.
>
> None of these considerations, however, operates to defeat the court's jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike.

It will, therefore, be seen that all this court actually held in the *International Coal case* was that the trial court had jurisdiction to award such actual damages as the plaintiff might be able to show resulted to it by reason of the admitted departure from the published rate in favor of other shippers, and that there was no question for the Commission to pass on, because, on the one hand, the departure from the published tariffs was admitted, and on the other, the defense of nondiscrimination was irrelevant. This court did

not hold in the *International Coal case* that if, as in the *Mitchell case*, the departure from the tariff was denied, that the court in such event would still have had jurisdiction without preliminary recourse to the Commission to determine whether there was in fact such a departure. Still less, of course, did this court hold that had there actually been two published rates for the services to the respective shippers and discrimination charged to result from the published rates, that the action might have been maintained without preliminary resort to the Commission. Clearly, in either of these events, there would have arisen administrative questions which the Interstate Commerce Commission must have first determined.

It is perhaps opportune to mention here, what will be further developed, that what this court in its decisions has repeatedly referred to as an administrative question without, so far as petitioners are aware, defining the meaning of the term "administrative," is essentially nothing more or less than such a question arising within the administrative functions of the Commission, as requires uniformity of decision in order to insure the uniformity of rates and services which it is the object of the Interstate Commerce Act to secure.

In *Florida East Coast Lines* v. *United States* (234 U. S. 167) this court reversed the District Court which had refused to enjoin an order of the Commission directing a reduction of rates on the ground of unreasonableness. This court did so, however, solely on the ground that the Commission had acted without

any competent evidence to support its order, and that, therefore, as a matter of law, its order was void.

The case of *Pennsylvania Railroad* v. *Puritan Coal Co.* (237 U. S. 121) has already been somewhat discussed in connection with the consideration given under the first division of this argument to the case of *Pennsylvania Railroad* v. *Clark Coal Co.* (238 U. S. 456). It is there pointed out that this court in distinguishing that case from the *Puritan case* did not point out the fundamental distinction any more than this court had done in distinguishing the *International Coal case* from the *Mitchell case*. It was there suggested that the fundamental distinction between the *Puritan case* and the *Clark case* was that the question in the *Clark case* was whether the carrier's rule of car distribution was unjustly discriminatory, while in the *Puritan case*, because of the character of the pleadings, the only question was whether the plaintiff had been damaged by the admitted departure from the carrier's own rules. It was further pointed out that this court had expressly recognized in the case of *Eastern Railway Co.* v. *Littlefield* (237 U. S. 140) that the court's jurisdiction in the *Puritan case* was sustained largely on the nature of the pleadings. Indeed, in the *Puritan case* itself, this court, at page 130, commented on the difficulty of deciding the question of jurisdiction because of the nature of the pleadings.

It has already been suggested, in the previous discussion of the *Puritan case*, that, even assuming that the violation of the carrier's own rules was ad-

mitted, it was at least doubtful whether preliminary resort to the Commission should not be required. It is here desired to further consider this suggestion. On pages 131 to 132 this court says:

> * * * It must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. * * *
>
> But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide *a mere question of fact as to whether the carrier has violated the rule to the plaintiff's damage.*

In the first place, it is most respectfully suggested that the language of the above quotation which has been italicized is misleading. Without reference to the soundness of the distinction which this court suggests, it is obvious that what this court meant was that it was a *mere question of fact as to whether the plaintiff had been damaged* by the (admitted)

violation of the rule, and that this court did not mean to say that *it was a mere question of fact whether the carrier had violated the rule*. This is pointed out because otherwise the court's language would lend color to the contention made in the case at bar that a court could decide whether the rule had been violated. Even assuming, however, that the meaning here suggested is the real meaning which the court intended to convey, the petitioners feel warranted in at least questioning the soundness of the holding.

It seems that there would at least be force in a contention that a shipper should not be permitted to recover damages even where the violation of a carrier's rule is admitted, without preliminary recourse to the Commission, because it might well be that the rule itself would be discriminatory as against other shippers and that the plaintiff itself therefore was not entitled to demand its observance. In view of the necessity of uniformity of car distribution among the shippers of the country as a whole, it seems extremely doubtful whether the necessity for preliminary resort to the Commission should be left to depend upon the raising of the question of the propriety of the rule either by the carrier, who naturally would not attack it, or by the shipper, who might be unduly favored by it.

However this may be, one thing is clear in the *Puritan case*, as it was clear in the *International Coal case*, that this court did not hold that had the question been presented on the record as to whether or not the carrier's own rule had been departed from,

instead of the departure being admitted, the court would still have been held to have jurisdiction without preliminary recourse to the Commission.

The case of *Eastern Railway Co.* v. *Littlefield* (237 U. S. 140), as has just been noted, is on all fours with the *Puritan case*, and it is therefore unnecessary to repeat what has just been said.

The case of *Illinois Central* v. *Mulberry Hill Coal Co.* (238 U. S. 275), it has likewise already been noted, purports to be based on the *Puritan case*, but fails to recognize, what this court had already recognized in the *Eastern Railway case*, that the *Puritan case* was controlled by the nature of the pleadings. It is difficult to see, in the *Mulberry case*, how this court avoided the conclusion that the State statute could be otherwise than a direct burden on interstate commerce, since it had been construed by the State supreme court as requiring the carrier to furnish cars within a reasonable time, as and leaving to the court instead of to the Commission the decision as to what was a reasonable time, depending on the circumstances and conditions of a given case "including the requirements of the interstate commerce carried on by the corporation." In fact, the petitioners are again forced to the conclusion that the *Mulberry* decision can only be accounted for by the peculiar nature of the pleadings in that case and by the failure of this court to recognize, in that case, what it had already recognized in the *Eastern Railway case*, that the *Puritan case* itself was controlled by the nature of its own pleadings.

In the case of *Philadelphia & Reading Railroad Co.* v. *United States and Allentown Portland Cement Co.* (240 U. S. 334) this court merely set aside an order of the Commission based on a finding of discrimination, because the court held that the facts did not, in law, support such a finding.

In *Pennsylvania Railroad Co.* v. *Jacoby* (242 U. S. 89) this court set aside an award of damages by the Commission for car discrimination, again merely because of an error in law as to the measure of damage.

The case of the *Pennsylvania Railroad* v. *Sonman Company* (242 U. S. 120) the petitioners must confess they are unable either to distinguish or reconcile with any other decision of this court. They do not question the soundness of that portion of this court's opinion, page 124, which says:

> The act does not supersede the jurisdiction of State courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power. * * *

What they are unable to follow is this court's conclusion that no such question was involved in that case. It is to be noted that this court rests its decision largely upon the *Eastern Railway*, the *Puritan* and the *Mulberry Hill cases*. As has already been seen the *Puritan* and *Eastern Railway cases* were expressly controlled by the peculiar nature of the pleading in those cases, under which the departure from the carriers own rules was taken as admitted. The *Mulberry Hill case*, it has moreover been seen, was

based on the *Puritan case* through a failure to recognize the controlling nature of the pleadings in that case. This court, however, expressly based its decision in the *Mulberry case* on the ground that there was no attack on the carriers rules. In the *Sonman case*, on the contrary, not only was there no admission by the carrier that its rules had been departed from, but the carrier itself contended that its rules did not permit the furnishing of all cars which the shipper demanded, and that its rules were reasonable and proper in this respect (see p. 126). In fact it is difficult to escape the conclusion that in the *Sonman case* this court went far beyond any decision before or since that case, in sustaining the jurisdiction of the court without preliminary resort to the Commission. Furthermore it would appear that the underlying reason for this was that this court in fact, though not in terms, undertook to decide the merits of the carriers rule, a question which, under the *Abilene case* and the cases following it, this court has recognized to lie as far beyond its original jurisdiction, as beyond that of any other court.

The case of *Swift & Company* v. *Hocking Valley Railroad Co.* (243 U. S. 281) is merely referred to here because of a remark in the opinion which, taken without its context, might be misleading. On page 290 of its opinion this court said:

> It can not be said that a charge for detention of a private car and use of a railroad track under such circumstances is unreasonable.

Whether or not such a charge was unreasonable, as has just been seen, was a question which this court had no more right than any other court to consider as an original question. It will be noted, however, that in the following sentence of its opinion this court refers to the upholding of the charge by the Interstate Commerce Commission.

The case of *Pennsylvania Railroad Co.* v. *Kitanning Co.* (253 U. S. 319) deserves particular consideration. In that case the carrier had sued in a State court to collect demurrage charges on frozen ore, and the State court dismissed the suit on the ground that the interstate tariff did not provide for demurrage under the facts of the case. This court reversed the State court, differing with it on the merits of the tariff construction, and held the demurrage collectible under the tariffs. It should be noted, first, that this was a suit by a carrier, and, second, that no question was raised of the jurisdiction either of the State court or of this court to determine the application and meaning of the tariffs. Further consideration will be given this case in the discussion of the question as to whether there is any difference in respect of a court's jurisdiction to construe a tariff where a suit is brought by a carrier rather than by a shipper. It will suffice at this time to say that the petitioners will contend that there is no distinction, and that in case of dispute as to the proper construction of a tariff, the question must be remanded by a court in which the carrier has sued to the Commission for preliminary determination, just as a shipper is required to have

primary resort to the Commission to determine a similar question. In any event, the *Kitanning case* can not be taken as deciding against such a contention, since the question was not raised.

In the case of *St. Louis, Iron Mountain & Southern Railway Co.* v. *Hasty* (255 U. S. 252) this court did not have under consideration an interstate, but a State tariff, and the question was not whether there should be preliminary resort to the Interstate Commerce Commission, but to the State commission, to determine the application of the tariff. This court held that preliminary resort to the State commission was not necessary, because this court assumed (p. 256) that:

> The matter is so free from doubt that there is no occasion to apply to the Commission for a construction, as insisted by appellant under *Texas & Pacific Ry. Co.* v. *American Tie Co.*, 234 U. S. 138, 146.

Far, however, from being free from doubt, a reference to this court's opinion in the *Hasty case* will show that there was extensive evidence before the master in favor of the carrier's contention that the tariff did not include the commodity in question, and this court would seem to have ignored the very reasoning by which it had itself rejected a similar contention in the *American Tie case*, that the question was free from doubt (see pp. 146 to 147 of the opinion in that case). This, again, is a case where this court would appear to have been misled by its own conception of the merits of the disputed question.

It is most respectfully insisted that where there is *any* bona fide dispute this court, equally with all other courts, is without jurisdiction to decide the merits of it until the Commission has passed upon it, and then can only review the Commission if the Commission has acted arbitrarily. As has been seen, however, the *Hasty case* does not involve interstate, but State traffic, and therefore may be disregarded. Moreover, the language quoted recognizes, at least by implication, that *if there is any doubt* resort must first be had to the Commission.

In the case of *Central Railroad* v. *United States*, decided December 5, 1921, this court sustained an injunction restraining the enforcement of an order of the Interstate Commerce Commission requiring the removal of alleged discrimination in connection with the privilege of creosoting in transit of forest products. In so doing this court merely held that the facts did not in law warrant an order based on discrimination, though "the Commission *might*, therefore, acting under section 1, have directed the Central and the Pennsylvania to establish the creosoting in transit products at Newark *if it deemed failure to do so unreasonable or unjust.*" It will be noted that this court did not undertake to determine whether the facts proved that it was unreasonable or unjust to refuse to establish the creosoting in transit products at Newark, but expressly recognized that this was a question for the decision of the Commission.

The case of *Schaff, Receiver,* v. *Famechon Co.*, decided by this court, February 27, 1922, dismissed a

writ of error to review the decision of the Supreme Court of Minnesota on the ground that such review should have been sought by a petition for writ of certiorari, in that no question was involved of the validity of an authority exercised under the United States. Had this case been considered on its merits, it would appear that it might have involved the same question as is involved in the case at bar.

This somewhat extended discussion of the cases cited, under Point II of the brief, has been necessary in order to demonstrate what has already been shown in connection with the cases cited under Point I; that is, that whatever justification these decisions may seem to offer, when superficially viewed, for a contention that the original doctrine of the *American Tie case* has since been limited or modified, more careful analysis shows them to be either entirely consistent with that doctrine, or to be themselves distinguishable either on the pleadings or facts.

With the same purpose, brief consideration, therefore, will be given to the decisions of the State and subordinate Federal courts cited under Points III, IV, and V of the brief. This argument will then be concluded by a discussion of the question, which after all must be the real question for this court to decide; that is, whether the doctrine of the *American Tie case* is in itself a correct doctrine which should be reaffirmed, or whether that doctrine should now be modified or repudiated.

II.

Decisions of State and subordinate Federal courts.

To avoid further unduly protracting this argument, the decisions of State and subordinate Federal courts cited under Points III, IV, and V will not be discussed in detail. It will suffice to say that the only decisions of State or subordinate Federal courts since the decision of this court in the *American Tie & Timber case* which have followed that decision, are the two cited under Point IV of the brief, *Cheney* v. *Boston & Maine Railroad Co.*, 116 N. E. (Mass.) 410, and *Poor* v. *Western Union Telegraph Co.*, 196 S. W. (Mo.) 28.

In the cases cited under Point III of the brief, the State and subordinate Federal courts have either ignored the decision of this court in the *American Tie case* or have misconstrued it, or conceivably, have considered it modified by language in the subsequent decisions of this court discussed under Points I (*a*) and I (*b*) of this argument. In this respect particular attention is called to the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *National Elevator Co.* v. *C., M. & St. P. Ry. Co.* (246 Fed. 588), cited by the Supreme Court of Minnesota as supporting the decision of that court in the *Reliance Elevator case*, and therefore in the case at bar. It will be observed that the Circuit Court of Appeals does not even refer to the *American Tie* decision.

In the case of *Francisconi* v. *Baltimore & Ohio Railroad* (247 Fed. 687) the Circuit Court of Appeals

for the Second Circuit, referring to the *American Tie case* in connection with a suit for damages for delay to two private tank cars owned by the plaintiff, the compensation for the use of which the carriers contended, was fixed by the mileage allowance in the published tariffs, said:

> If this case means generally that the interpretation of all rules must be fixed first by the Commission, then no case can come up in court involving the meaning of any rule unless the parties agree upon that meaning. In that case the question was of rates, and the case may possibly be taken as deciding that the meaning of rates is always primarily for the Commission. Here, however, is a question whether the rule provides for the involuntary detention of cars; if it does not, that detention was a wrong, and it can not be argued that there is a rate established for a wrong. The mere fact that the enforcement of a rule of the Commission comes incidentally in question does not divest a court of jurisdiction. The Supreme Court has several times enforced such rules or practices of the carriers without preliminary recourse to the Commission. *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59L. Ed. 867; *Swift & Co.* v. *Hocking Valley R. R. Co.*, 243 U. S. 281, 37 Sup. Ct. 287, 61 L. Ed. 722; *Pa. R. Co.* v. *Kitanning Co.* 253 U. S. 319, 40 Sup. Ct. 532, 64 L. Ed. 928. It can not be that the rule is to be enforced only when its meaning is not in dispute, and in the last case cited there was a careful analysis of the meaning

of a rule and a decision as to its application to the case. *Texas & Pac. Ry. Co.* v. *American Tie & Timber Co.*, supra, must be understood as depending upon the fact that it was a rate which was in question.

This opinion of the Circuit Court of Appeals well illustrates how State and subordinate Federal courts have seized upon the superficial aspects of such cases as the *Puritan*, the *Sonman*, and the *Kitanning* cases as a justification for ignoring the doctrine of this court in the *American Tie case*, and for treating that doctrine as having been subsequently modified. The same question involved in the *Francisconi case* has been considered by the Supreme Court of Illinois in the *Gustafson case* (129 N. E. 516), and by the Circuit Court of Appeals for the Eighth Circuit in the case of *Empire Refineries (Inc.)* v. *Guaranty Trust Co. of New York* (271 Fed. 668), with the same result. As in the *Francisconi case*, the courts entirely failed to recognize the necessity of uniformity in the decision of such questions, either as to whether the compensation provided by the tariffs included compensation for delay, or as to whether the tariffs were unreasonable in failing to provide such compensation. Again, like the Circuit Court of Appeals in the *Francisconi case*, the courts have treated the raising of the jurisdictional question as a mere attempt to evade liability.

It would too greatly extend this argument to analyze in detail the decisions of State and subordinate Federal courts cited under Point V of the brief. The dates of those decisions antedating the decision

of this court in the *American Tie case* are there shown, and it is perhaps sufficient to note that they do antedate that decision. If space permitted, certain of these cases would repay detailed analysis and would demonstrate the general lack of appreciation of the controlling force of the necessity of uniformity in deciding such jurisdictional questions. On the other hand, the *American Tie* decision is not even referred to by the courts in the cases of *Western & A. R. Co.* v. *White Provision Co.* (82 S. E. (Ga.) 644), and *Southern Pacific Co.* v. *Frye & Bruhn* (143 Pac. (Wash.) 163), although both decisions were made after the decision of this court in that case.

The case of *Gimbel Bros.* v. *Barrett* (215 Fed. (Dist. Pa.) 104), is analogous on the pleadings to the *Puritan case*, and the court might on this ground have distinguished it from the *American Tie case*. Instead, however, of doing this, the court undertakes to misconstrue the latter case.

In conclusion, on this point it will suffice to say that these decisions of State and subordinate Federal courts fully warrant this court in now making clear, once and for all, what is the jurisdiction of the Commission and of the courts, respectively, with reference to disputed questions of tariff construction, and, perhaps equally important, to make clear the principles upon which such jurisdiction shall be determined.

III.

This court should reaffirm the doctrine of the American Tie case so as to make clear that the requirement of preliminary resort to the commission to determine a disputed question of tariff construction has not been, and will not be modified.

It has been seen that, with two exceptions, both State and subordinate Federal courts have either failed to understand the true scope of this court's decision in the *American Tie case*, or have considered the doctrine of that case modified by subsequent decisions of this court. It has likewise been seen that, while superficially considered, the language used by this court in subsequent decisions lends some color to the contention that the original doctrine has been modified, those cases when properly analyzed are not inconsistent with the full force of that doctrine.

The question which remains to be discussed is the validity of that doctrine itself, in order that this court in re-examining the doctrine should be satisfied that it is a valid and necessary one. Enough has been shown to warrant this court, if so satisfied, in reaffirming that doctrine in unmistakable terms, in order to remove the confusion now existing throughout the State and subordinate Federal courts.

At the outset it should be noted that the doctrine, as petitioners have stated it, contains its own, and what should be, its sole qualification—that is, that the question of construction must be a disputed one in order to require preliminary resort to the Com-

mission. Whether this is indeed the logical limit of the doctrine, it is not necessary to consider at length here, since both in this case and in the *American Tie case* the question was a disputed one and the solution of the dispute was the sole issue before the court.

It will not be amiss, however, to recur briefly to what has already been suggested in connection with questions of car distribution. It has been noted that there would seem to be sound reasons for requiring resort to the Commission as to such questions, even where the carrier's rules are not attacked as either unreasonable or discriminatory, and although the action is based solely on an admitted departure from the rules. This, because it may well be that the enforcement of the rules would itself lead to discrimination against other shippers—a fact which neither the carrier responsible for the rules, nor the shipper claiming the benefit of them, would be prone to bring to light. Since the object of preliminary resort to the Commission, in any event, is to protect the uniformity of rates and of service which it is the primary object of the Interstate Commerce act to secure, it would seem possible to argue, by analogy, that in all cases where the application of a tariff was the basis of recovery or of defense, it might logically be necessary to resort to the Commission in the first instance, even where the application or meaning of the tariff was not disputed. However this may be, there are such obvious practical advantages in assuming that, in the absence of dispute, the undisputed applica-

tion of the tariff will be uniformly applied to all alike, that any hyper-logical considerations are far outweighed. It will therefore be assumed that the requisite uniformity will be insured if resort is required to the Commission only where the question of tariff construction is a disputed one.

Moreover, it seems quite unnecessary to argue to this court the desirability of uniformity in the application of rates and in the rendition of services. However much the members of this court may have differed as to how that uniformity was to be secured, or as to whether a particular case involved the question, this court has never failed to recognize that the primary purpose of the Interstate Commerce act was to secure such uniformity. The discussion here will be confined, therefore, to the question as to whether in order to secure such uniformity, preliminary resort must be had to the Interstate Commerce Commission to decide disputed questions of tariff construction, and whether, therefore, as a necessary corollary, the courts must be excluded from the primary consideration of such questions.

It has already been noted that preliminary resort to the Commission is required, not primarily because the Commission is more apt to be right than a court, but because, right or wrong, the observance of the Commission's construction will insure uniformity, since there is only one Commission and there are many courts.

Secondarily, however, this court has recognized, and it is undoubtedly true, that the facilities of the

Commission for the solution of such questions, together with the inevitable acquisition of specialized knowledge which the Commission must obtain from its continuous consideration of them, would seem to make the correct solution of such questions more probable by the Commission than by the ordinary court. In this connection it should particularly be remembered that the decision of such questions frequently depends upon the application of the Commission's own rules and regulations for the publication and filing of tariffs and prescribing the nature and character of their contents—regulations and rules which the Commission is expressly empowered by section 6 of the act to prescribe. Indeed it is to be noted that one of the specific grounds upon which this court, in the *American Tie case*, required preliminary resort to the Commission for the construction of a tariff was that such a controversy

> "was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute."

As illustrating the complex and voluminous rules and regulations involved in the construction of a tariff, the petitioners are appending to this brief for the information of the court a copy of the Commission's Tariff Circular 18–A. It will be noted that this circular has been entitled by the Commission "Regulations to govern the construction and filing of freight tariffs and classifications and passenger fare schedules. Administrative rulings."

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An examination of the circular will disclose that it contains some 85 pages of rules as to the publication, filing, and contents of tariffs, and some 35 pages of administrative rulings interpreting these rules. It is proper to say here that none of these rules or administrative rulings is specifically referred to in the record in this case, and this tariff circular is appended to this brief, not for the purpose of determining the merits of the tariff question here involved, since the merits are not before this court, but merely as illustrative of the considerations which may enter into the determination of such a question.

Attention has, however, already been called in the Statement of Facts herein, to the fact that the very language of the tariff, which is here in dispute, is language copied verbatim from the order of the Commission suspending the tariff previously published. It would seem, therefore, that this is peculiarly a case where the Commission is best qualified to reach a correct conclusion as to the meaning of that language. The petitioners, however, desire to repeat what they have already mentioned in the Statement of Facts; that is, that they do not urge this accidental circumstance as the fundamental ground for requiring resort to the Commission, or as distinguishing this case from any other case in which there is a dispute as to the proper construction of a tariff, since as has already been pointed out, the controlling reason for such resort is not to secure correctness, but to secure uniformity, of decision.

What objections, then, can be urged to requiring, in the interest of uniformity, preliminary resort to the Commission to determine a disputed question of tariff construction? The petitioners have endeavored to discover any objections that present even the slightest plausibility, and these objections will now be considered.

First.—That a published rate, being a fixed and definite numerical symbol, is not open to construction, and uniformity can therefore be secured by requiring resort to the Commission before any change is made in the rate, and by requiring its strict observance until so changed. That, on the contrary, in the everyday application of a tariff, each agent of the carrier must of necessity construe the language of the tariff, and consequently there is no way of insuring uniformity of construction. This objection is so far valid that it must be admitted that the same uniformity can not be secured in the construction of language as is possible in the observance of a definite numerical symbol. This does not mean, however, that, entire uniformity in the construction of tariffs being impossible, no effort should be made to insure as much as is possible, and it is self-evident that the maximum uniformity will be obtained if, when a dispute arises as to the proper construction, that dispute is left to the decision of one tribunal in place of being left to the varying decisions of many. At least when the question is decided there will then be no further excuse for any lack of uniformity. Moreover, it should be noted that the same objection may

be made with equal force to requiring preliminary resort to the Commission to decide whether or not discriminations exist in rates or services. Many such discriminations are inevitable and yet remain undiscovered. No one, however, suggests that the courts and not the Commission should determine the fact of discrimination merely because discriminations in general do not come to light until they become the subject of controversy.

Second.—It may be suggested that uniformity of construction can be obtained through review of the decisions of the various courts, while no such uniformity of rates could be obtained merely by review, if the fixing of rates were left to the courts. It is not entirely clear whether even in theory the suggested distinction exists. If it does, it rests essentially on the supposition that questions of construction of language are questions of law, and that the presumption must be indulged that any conflicts between the lower courts as to questions of construction can, like errors of law, be uniformly and properly corrected by review. Aside from the highly impractical character of such reasoning, it rests on a fallacious premise. Questions of construction of tariffs are not questions of law, but are essentially questions of fact, depending upon practical and technical considerations peculiarly within the knowledge of the Commission and, as has been seen, frequently requiring the Commission to construe the rules and regulations which it is specifically, and alone, empowered by the act to prescribe.

Third.—That there is no definite procedure prescribed by the act which affords a carrier the means for preliminary resort to the Commission, where a carrier, and not a shipper, sues to enforce its construction of a tariff. Therefore, since jurisdiction must be left to the courts to determine questions of tariff construction where a carrier, and not a shipper, is the plaintiff, there is no reason for not leaving the courts jurisdiction where a shipper is plaintiff. Even, however, if the assumption were correct, that the courts must be allowed to retain jurisdiction to decide such questions where a carrier is plaintiff, the conclusion would not follow that such jurisdiction must be left to the courts where the shipper sues. Again, it would merely be a case of securing the maximum possible uniformity by requiring a shipper in any event to have preliminary resort to the Commission. But the assumption is not correct that such preliminary resort is not open to a carrier, and therefore that the courts retain jurisdiction of such questions in a suit by a carrier. The petitioners are confident that were this specific question presented to this court, this court could find ample justification for construing the provisions of section 13 of the act, empowering the Commission to enter upon investigations of its own initiative, as broad enough to provide the necessary procedure to enable a carrier to obtain the decision of such a question from the Commission. Likewise, it may be objected that, even if such procedure be available, it is not practicable to

require a carrier whenever it sues—as, for instance, to enforce the collection of a rate or charge specified in the tariff—to first obtain a construction by the Commission of the meaning of the tariff. The answer to this objection is found in the limitation on the requirement of preliminary resort to the Commission which the petitioners have already noted; that is, that such resort is not required unless the application or meaning of the tariff is disputed. The petitioners believe therefore that, where a carrier sues, a court will be warranted in assuming jurisdiction, unless on the pleadings or at a trial a dispute arises as to the proper meaning or application of the tariff. In the event of a bona fide dispute so arising, the court can then remand the question to the Commission for decision or abate the case until application has first been made to the Commission.

It may be admitted in this connection that questions concerning the statute of limitations may arise in connection with preliminary resort to the Commission, because the limitation of time in which application must be made to the Commission to determine such questions may conceivably conflict with the varied limitations of time in which such actions could otherwise be maintained in the courts. It, however, is not necessary to consider such questions here, as they do not arise on this record, and the petitioners believe that, if they should arise, they can be reconciled without disregarding the obvious necessity, in any event, of preliminary resort to the Commission.

Finally, it is insisted that the criminal provisions of the act would be seriously interfered with and rendered unconstitutional if, before an indictment could be sustained for violation of a tariff, preliminary resort must be had to the Commission to determine the meaning or application of the tariff. It is claimed (*a*) that such a doctrine would make the Commission at once judge and prosecutor and (*b*) that it would render the acts made criminal so indefinite as to violate constitutional requirements. As to (*a*), it will suffice to say that the Commission is not the prosecutor under the act, but the prosecutor is the Attorney General, and that so far as the Commission in its administrative capacity acts as judge it would, of course, have to afford full opportunity to the accused to be heard. As to (*b*), it will suffice to say that there can be no more objection to the determination by the Commission, after the fact, as to what was the correct meaning of the tariff, than there can be to the determination of the same question by a court, likewise after the fact, and that the decision of the Commission there will have the great advantage of uniformity, which will prevent prosecution of a man in one jurisdiction for the very act which a court in another jurisdiction might not consider to be a violation of the same tariff.

Finally, it can be answered that this is not a criminal case, but that if it were this court has met and considered and overruled these very objections in the case of *United States* v. *Pacific & Arctic Co.* (228 U. S. 87). In that case this court set aside the

conviction of a rail carrier for criminal discrimination in refusing to accord through routes to one steamship line while affording through routes to other steamship lines in which the rail carrier was interested. This court said (pp. 106 to 108):

> The decisions of the District Court upon counts 3, 4, and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. (For violations of the Sherman Anti-Trust act.) The District Court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The Government attacks the conclusion with arguments of great strength and contends that it makes the Commission not only the judges of the civil relief that private shippers may be given against the carriers by the interstate commerce act, but gives the Commission the control and practical determination of the criminal provisions of the law. The argument, in effect, is that the conclusion of the District Court confounds the civil and criminal remedies of the law, the private injury, and the public injury resulting from the violation of its provisions. And who, it is asked, will initiate the criminal proceeding and by what proof will it be supported? What degree of proof is to be accorded to the finding of the Commission—presumptive or conclusive? If neither, it is argued, "it would be a senseless thing to regard such a finding as a condition precedent

of the United States to indict." If, it is asked further, the finding of the Commission is to have either *prima facie* or conclusive effect, against whom is it to have such effect? If against a defendant, what becomes of the sixth amendment to the Constitution? The The argument of the Government is cast in a series of questions which end in the final answer, as it is contended, that under the decision of the District Court the Interstate Commerce Commission "becomes practically the court of final criminal jurisdiction."

The contentions of the Government would be formidable indeed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to wit: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co., supra.* And it would, in our judgment, be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility

> which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers, and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

These, then, comprise all possible objections to requiring preliminary resort to the Commission for the determination of a question of tariff construction, which have occurred to the petitioners in their analysis of that question, and they have endeavored to overlook none. It is, of course, possible that they have done so. If they have, it is assumed that such as there may be will be suggested by counsel for respondents or will occur to the court. The petitioners are confident, however, that none can be raised potent enough to overcome the controlling consideration upon which the requirement of such preliminary resort rests—the necessity of uniformity in the decision of such questions.

In conclusion, therefore, the petitioners submit that much of the misunderstanding of this requirement will be removed when it is generally appreciated that it does not render nugatory the provisions of sections 9 and 22 of the act, which specifically reserve to claimants their choice of forum, but that, merely in the interest of uniformity, resort is required to the Commis-

sion in the first instance, without, however, in reality depriving claimants of their election as to the forum in which they shall finally enforce their rights, once the preliminary question has been determined by the Commission. Moreover, the petitioners believe that if it is understood that the justification for preliminary resort to the Commission lies essentially in the necessity of uniformity of decision, whether right or wrong, and not in any invidious comparison of the relative ability of the courts and of the Commission to decide such questions, the courts will be the more willing to observe this requirement.

The petitioners, therefore, most respectfully submit that, in order to insure that uniformity of rates and services which this court has recognized it is the primary purpose of the interstate commerce act to secure, this court should now make clear, once and for all, that preliminary resort must be had to the Commission to determine a disputed question of tariff construction, and that the courts must be excluded from the original consideration of such a question.

Respectfully submitted.

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WASHINGTON, D. C., *April —, 1922.*

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